No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

STATE OF TEXAS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. The Legal Center files in this case because small businesses have a strong interest in ensuring that administrative agencies

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

follow the procedural requirements of the Administrative Procedure Act. The regulations that agencies promulgate almost always affect small businesses. If these agencies override the notice-and-comment requirement, as they often do, small businesses will lose their statutory right to participate in these rulemakings.

SUMMARY OF THE ARGUMENT

It is common ground that the administrative state occupies "a unique constitutional position." *FCC v. Fox Television Stations*, 556 U.S. 502, 536 (2009) (Kennedy, J.) (concurring in part and concurring in the judgment). Agencies exercise legislative power, executive power, and judicial power—sometimes all at once and often beyond the immediate control of any branch of government. That reality has always raised legal and practical concerns. From a legal perspective, agencies raise serious separation-of-powers questions. Practically, the vast authority they wield over the everyday lives of ordinary citizens is alarming. It is with trepidation, then, that this Court accepts as constitutional the empowerment of unelected bureaucrats to effectively write, enforce, and interpret federal laws.

The Administrative Procedure Act ("APA") has been essential in mitigating these overarching concerns. By imposing procedural and substantive requirements on agencies, the APA endows them with at least some democratic legitimacy. When adhered to, the APA helps to ensure that agencies do not exercise their sweeping authority in arbitrary and abusive ways. Section 553's notice-and-comment requirement, which requires public participation before agencies may issue most rules, is

the statute's centerpiece. *See* 5 U.S.C. § 553(b)-(c). Under this provision, the agency, first, "must issue a general notice of proposed rule making." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citations, quotations, and alterations omitted). "Second, if notice is required, the agency must give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments .... Third, when the agency promulgates the final rule, it must include in the rule's text a concise general statement of its basis and purpose." *Id.*

The APA's notice-and-comment requirement thus promotes several important values. It promotes fairness and transparency by affording affected parties advance notice of new or changing legal regimes. It promotes legitimacy by giving those who object to the proposal the opportunity to be heard. It promotes accountability by facilitating congressional and popular oversight. It promotes stability by deterring *ad hoc* decisionmaking and the imposition of vague standards of conduct. And, by requiring public input, it promotes thoughtful, reasonable, and ultimately better legal rules. An agency's failure to comply with the APA's notice-and-comment requirement, accordingly, strikes at the heart of the bargain the APA struck between those who saw agencies as undemocratic and constitutionally dubious and those persuaded that "[t]he Federal Government could not perform its duties in a responsible and effective way without" them. *Fox Television Stations*, 556 U.S. at 536 (Kennedy, J., concurring in part and concurring in the judgment).

As both the district court and the court of appeals held, that is what happened here: the Department

of Homeland Security ("DHS") issued the Deferred Action for Parents of Americans and Lawful Permanent Residents Memorandum ("DAPA") without notice and comment. The United States defends DHS's decision by claiming the program is exempt under Section 553's exception for "'general statements of policy.'" Brief for Petitioner ("Pet. Br.") 68-73 (citing 5 U.S.C. § 553(b)(3)(A)). In mounting this argument, however, the United States ignores the APA's essential purpose and advocates for a novel and untenable legal standard. Given the fundamental values that notice-and-comment rulemaking promotes, as well as the constitutional concerns that led to its passage in 1946, courts have uniformly agreed that this exception must be construed narrowly. In this area of the law, the adage that broad exceptions will eventually swallow the rule rings true. Procedures complicate the regulator's life. Notice-and-comment rulemaking can be time-consuming, burdensome, and a flashpoint for policy disagreements. Of course, that is the idea.

It is up to judges, therefore, to keep a watchful eye so that regulators do not exploit limited exceptions in an effort to bypass procedural protections that make their unique status constitutionally tolerable. This is a case in point. The United States takes the view that the "general statements of policy" exception applies anytime a rule does not "create legally enforceable rights or obligations in regulated parties." Pet. Br. 65. That would expand the exception beyond the narrow circumstances to which it is meant to apply. The better interpretation, adopted by the lower courts, is that a rule qualifies as a general statement of policy only if it is not binding on *the agency itself*. That understanding follows from the APA's text and purpose. "Rules issued through the notice-and-comment process

are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez*, 135 S. Ct. at 1203. An agency's tentative (*i.e.*, non-binding) conclusion as to a particular issue does not have the force and effect of law. If the agency plans to bind itself to a particular view, however, there must be public input before the rule takes effect.

The United States argues so forcefully against the prevailing interpretation of Section 553, notwithstanding its lack of case law support, because DAPA is obviously binding on DHS. The district court found as a matter of fact that the program is not discretionary. It binds, or, at a minimum, severely restricts, the discretion of DHS officials to deny status to an unauthorized alien who meets DAPA's criteria. DHS claims it has retained discretion to deny legal status in specific cases. But the district court found otherwise; that finding must be given credence. In short, "it is clear from the record that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein." Petition Appendix ("Pet. App.") 386a. The way that DHS has implemented the Deferred Action for Childhood Arrivals ("DACA") program bolsters that finding. Only five percent of the 723,000 DACA applications have been denied—and *none* have been denied for discretionary reasons. These sibling DHS policies are binding.

Finally, it ought to go without saying that DHS's violation of the APA's notice-and-comment requirement is no foot fault. These procedures are not for show. Their approach nevertheless appears to signal that the United States and its *amici* see DAPA as too important to be

enjoined for procedural reasons. That is unfortunate. This type of ends-justifying attitude not only ignores the *raison d'être* of notice-and-comment procedures, it reflects a lack of appreciation for the cultural problems it invites. Individual rights cannot be safeguarded from arbitrary and abusive regulations if the Executive encourages agencies to view process as an impediment to achieving policy goals.

Yet that has been this Administration's message from the outset. Since 2008, lower courts have repeatedly stepped in to stop the Administration from running roughshod over the APA. But a more definitive course correction is needed. The Court should leave no doubt that if agencies are to continue to wield legislative power, they must be faithful to the APA's notice-and-comment requirement. The judgment below should be affirmed.

ARGUMENT

I. The APA's Notice-And-Comment Command Is An Indispensable Structural Protection.

Agencies "wield[] vast power and touch[] almost every aspect of daily life." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). It was only a matter of time, then, before "the sheer amount of law—the substantive rules

that regulate private conduct and direct the operation of government—made by the agencies outnumber[ed] the lawmaking engaged in by Congress through the traditional process." *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting). "The 113th Congress, for example, enacted just under 300 laws. Over the same two-year period, the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*, *supra*, at 1.

The means by which federal agencies secured this sweeping power has always been a source of controversy. Foremost, "as a practical matter they exercise legislative power, by promulgating regulations with the force of law." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting). Congress must "lay down by legislative act an intelligible principle to which" the agency at issue "is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). But the delegation doctrine has not often been used to discipline Congress. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000); *see also Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment). Thus, although the "wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest," there can be no serious dispute "that agency rulemaking is lawmaking in any functional or realistic sense of the term." *Chadha*, 462 U.S. at 986 (White, J., dissenting).

Not only do agencies exercise legislative authority, their interpretations of federal law often receive judicial deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Although there are notable exceptions, *see, e.g.*, *King v. Burwell*, 135 S. Ct. 2480 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), an agency's interpretation of its organic legislation, in the main, will control under *Chevron* unless "the statute unambiguously forecloses the agency's interpretation."[2] *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). That standard transfers interpretative authority from courts to agencies. "By design or default, Congress often fails to speak to 'the precise question' before an agency." *City of Arlington, Tex.*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting). "When it applies," therefore, "*Chevron* is a powerful weapon in an agency's regulatory arsenal." *Id.*

To be sure, *Chevron* is built on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity

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2. The United States has no claim to *Chevron* deference here. To be conceivably eligible for such deference, DHS would have needed to engaged in notice-and-comment before issuing DAPA. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (citations omitted). That failure thus not only violated the APA, it rendered *Chevron* deference unavailable. Even if DHS had complied with the APA, however, judicial deference to its interpretation of the Immigration and Nationality Act would have been inappropriate in any event. *See* Brief for Respondents ("Resp. Br.") 44.

allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). But that is difficult to reconcile with the principle that "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring). It would be untenable, for example, to suggest that it is compatible with Article III for a federal court to defer to the Department of Justice's interpretation of a criminal statute that it enforces. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concuring). Yet an agency's resolution of an equally significant statutory question will routinely be the final word—even when the agency's officials are not answerable to the President. *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

For these reasons, and others, agencies are rightly called "the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence." *City of Arlington, Tex.*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting). Agencies issue, interpret, and enforce the rules that govern our lives; "as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *Id.* at 1877-88. The authority agencies have accumulated over time is startling. "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation omitted).

The hazard agencies pose to the democratic process was not lost on Congress. "Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929 .... Fears and dissatisfactions increased as tribunals grew in number and jurisdiction, and a succession of bills offering various remedies appeared in Congress." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-38 (1950). These efforts culminated in the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *Fox Television Stations*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rulemaking" and "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b)-(c). Congress understood that, if agencies were going to wield legislative power, their procedures must be "adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Administrative Procedures in Government Agencies, at 102 (1941). Furthermore, those procedures were "likely to be diffused and of little real value either to the participating parties or to the agency, unless their subject matter is indicated in advance." *Id.* at 108. Public notice and comment, in short, was seen as

"essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.*

Congress's recognition of public participation as vital was not the product of generic concern over agency abuse. Congress saw notice-and-comment rulemaking as advancing concrete objectives. *First*, it restores at least some measure of democratic legitimacy to agency action. Section 553 "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); H.R. Rep. No. 79-1980, at 257 (1946). "Notice and comment is the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislating agency." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996).

Second, notice-and-comment rulemaking helps to secure consent of the governed: "public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies." Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. Rev. 695, 735 (2007). Legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules, in other words, depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, --- F. Supp. 3d ---, No. 14-1477, 2015

WL 5579653, at *21 (D.D.C. Sept. 21, 2015). Notice-and-comment rulemaking "opens the process to groups and individuals with discordant points of view who might otherwise not have been heard during an agency's routine process of consultation with the public." Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 402 (1985).

Third, wide dissemination of proposed rules holds agency heads accountable to Congress and the public for how they discharge their office. "Agency accountability is an important component under any of these theories of the administrative state's legitimacy." Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397, 418 (2007). We cannot hold the regulators accountable if we do not know what the regulators are up to. After all, "the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946).

Fourth, the APA's notice-and-comment obligation fosters predictability and stability in the administrative arena. The process forces the agency to take a definitive position on the matter, which, in turn, provides affected parties with certainty as to how to conform their conduct to the law. *See Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992). "At a minimum, it allows affected parties, who participate in the formulation of the rule, to anticipate the rule and plan accordingly." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 542 (2003).

Otherwise, affected parties must make it "their business (or their counsel's) to anticipate and guard against all possibilities." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1376 (1992). If agencies are going to fill "gaps" left by Congress in federal statutes, they must follow the procedures that give the public fair warning of what is required. "Citizens should be able to know what conduct is permitted or prohibited by an agency rule." 3 Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (5th ed. 2010).

The process also establishes a legislative baseline against which future agency action in that area will be measured. Although an agency may reverse course, it must give a "reasoned explanation" for doing so. *Fox Television Stations*, 556 U.S. at 515. As a result, an agency must engage in notice-and-comment rulemaking to alter a legislative rule. *See* 5 U.S.C. § 551(5); *see also Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987); Asimow, *supra*, at 396. By committing agencies to notice and comment where reliance interests are squarely implicated, the APA ensures that those who have accommodated themselves to the existing rule will not have the rug pulled out from under them without the chance to be heard. *See Fox Television Stations*, 556 U.S. at 536 (Kennedy, J., concurring in part and concurring in the judgment).

Fifth, and last, notice-and-comment rulemaking produces superior legal rules. A key benefit of affording notice and comment "is to allow the agency to benefit from the expertise and input of the parties who file comments

with regard to the proposed rule." *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). It "educates the agency, thereby helping to ensure informed agency decisionmaking." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985); *see also* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 904 (2004) ("[N]otice-and-comment rulemaking improves the quality of agency decisionmaking by mobilizing the whole spectrum of interested parties to direct arguments, information, and criticism to the agency."). More often than not, agencies will lack an appreciation for legal vulnerabilities, will use a sledgehammer when a scalpel will do, and will fail to adequately account for real-world consequences when they leap before they look.

II. DAPA Is Invalid Because It Did Not Go Through Notice And Comment In Accordance With The APA.

In light of the importance of notice-and-comment rulemaking, the United States' reliance on the APA's "general statements of policy" exception is indefensible. Section 553's exceptions must be construed narrowly so as not to defeat the provision's fundamental purpose. To that end, the lower courts broadly agree that this exception applies only when the rule is tentative and thus non-binding on the agency itself. As the district court found, however, DAPA is binding on DHS. That factual finding not only easily withstands clear-error review; the record shows that it is definitively correct.

A. The APA's Exceptions To Notice-And-Comment Rulemaking Are Narrowly Construed.

Section 553's notice-and-comment requirement applies to "rule making," which the APA defines as the process of "formulating, amending or repealing a rule." 5 U.S.C. § 551(5). The statute, in turn, broadly defines a "rule" to include "statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4). The United States does not dispute that DAPA is a "rule" as the APA employs that term. Pet. App. 54a, n.122.

The United States argues instead that DAPA, although a rule, is exempt from notice-and-comment "rule making" procedures. In particular, Section 553 provides that the notice-and-comment requirement does not apply to (1) "interpretative rules"; (2) "general statements of policy"; and (3) "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The United States defends DAPA as—and only as—a "general statement of policy." Pet. Br. 65. Unless this exception applies, DAPA violates the APA.

There are many problems with the United States' reliance on this exception. Most importantly, the United States ignores that Section 553's exceptions must be construed narrowly. Resp. Br. 60-61. The APA's legislative history is "scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (citing S. Doc. No. 248, 79th

Cong., 2d Sess. 19, 199, 258 (1946)); *see Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978) ("The legislative history of the [APA] demonstrates that Congress intended the exceptions in § 553(b)(B) to be narrow ones.") (citing S. Rep. No. 752, 79th Cong. 1st Sess. (1945)). For that reason, "judicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed." *State of N.J., Dep't of Envtl. Prot. v. U.S. Envtl. Prot. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

"In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Indeed, Congress "was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose." *Am. Bus Ass'n*, 627 F.2d at 528. Notice-and-comment procedures cannot bolster the administrative state's legitimacy if they are subject to broad carve-outs. *See Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) ("Exceptions to the notice and comment provisions of § 553 are to be recognized only reluctantly. Otherwise, the salutory purposes behind the provisions would be defeated."). Put simply, the three "exceptions itemized in Section 553" cannot be permitted "to swallow the APA's well-intentioned directive." *Sullivan*, 979 F.2d at 240 (citation omitted); *see*

Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984) ("The exceptions to section 553 will be narrowly construed and only reluctantly countenanced.") (citation and quotations omitted). If given the latitude, agencies will deploy them "to circumvent the notice and comment requirements whenever" it is "inconvenient to follow them." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

After all, it is no coincidence that the rules subject to notice and comment are "legislative" and those that are not are deemed "nonlegislative." *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). A rule is "legislative" if it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). Such rules require notice and comment because that process "improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citations omitted).

Nonlegislative rules, in contrast, "merely express[] an agency's interpretation, policy, or internal practice or procedure .... They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities." *Batterton*, 648 F.2d at 702. Section 553's exceptions "have a common theme in that they accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations

of effectiveness, efficiency, expedition and reduction in expense." *Am. Hosp. Ass'n*, 834 F.2d at 1045 (citation and quotations omitted).

At base, Congress created these narrow exceptions "to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake." *Id.* "Exemptions" therefore "should be recognized only where the need for public participation is overcome by good cause to suspend it, or where the need is too small to warrant it, as for example, when the action in fact does not conclusively bind the agency, the court, or affected private parties." *Batterton*, 648 F.2d at 704. They are not a license to make "important policy judgments [outside of] the more formal deliberative processes that produce legislation or legislative rules." Manning, *supra*, 917. That would violate the bargain struck in the APA. *See supra* at 6-14.

B. A Rule Is Not A "General Statement Of Policy" If Its Binds The Agency.

The United States' defense of DAPA as a "general statement of policy" cannot be reconciled with the need to construe Section 553's exceptions narrowly. According to the United States, an agency document is a "general statement of policy" as long as it does not "create legally enforceable rights or obligations in regulated parties." Pet. Br. 65. In so arguing, the United States promotes a definition so broad as to swallow the APA's notice-and-comment requirement. A construction of this exception that would permit agencies to issue major substantive policies without public participation, as this one clearly would, is untenable.

It should come as no surprise, then, that this proposed test for determining whether an agency rule is a "general statement of policy" finds *no* legal support. Indeed, the United States is unable to cite *any* judicial authority for this proposition. Resp. Br. 68-71. Its *amici* can do no better, relying solely on two cases dealing with interpretive rules, not general statements of policy. *See* Amicus Brief of Administrative Law Scholars ("Admin. Br.") 8-9 n.5.

The reason why the United States and its *amici* can find no support for their position is because courts uniformly agree that the "primary distinction between a substantive rule ... and a general statement of policy ... turns on whether an agency intends to *bind itself* to a particular legal position." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999) (citation omitted) (emphasis added); *see also Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978). "The significance" of whether the policy is binding on the agency "is that it reveals whether, if objections to the rule cannot be voiced through notice and comment rulemaking at the time of promulgation, there will be a subsequent opportunity to object to a specific application of the rule. If an agency, or its official, is bound to apply an airtight rule in a given case it is important to allow specific objections prior to promulgation, lest these objections be forfeited." *Jean v. Nelson*, 711 F.2d 1455, 1481-82 (11th Cir. 1983). "The ultimate concern," in other words, "is that the agency, despite its announced policy, be free to consider on their facts the cases that arise, *without constraint of the 'policy.'*" *Id.* at 1455 n.22 (emphasis added).

More fundamentally, if the purported statement of policy is binding, it has the "force and effect of law." *Chrysler Corp.*, 441 U.S. at 295. And, "if an agency rule could make legally binding policy without going through" the "formalities" of notice-and-comment rulemaking, it lacks "incentive ... to invoke the more cumbersome procedures." Manning, *supra*, 918. That is why "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Whether an agency statement is a legislative rule thus "hinges quite directly on the agency's intention ... to bind either itself or the public." Manning, *supra*, 918; *see also USTA v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

Determining whether the rule is "binding" must, in turn, focus on whether it "genuinely leaves the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). An agency statement retaining such discretion genuinely is an "announcement of [a] general policy which the [agency] hopes to establish in subsequent proceedings," *Am. Bus Ass'n*, 627 F.2d at 529, or a "tentative intention[] for the future," *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). If the statement eliminates discretion, however, then it is a "binding norm," *Am. Bus. Ass'n*, 627 F.2d at 529, which is "finally determinative of the issues or rights to which it is addressed," *Pac. Gas*, 506 F.2d at 38.[3]

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3. Some courts have held that agency pronouncements also qualify as legislative rules if they "impose ... rights and obligations," *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946

"If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion," then, "it will be taken for what it is—a binding rule of substantive law." *Guardian Fed. Sav. & Loan Ass'n*, 589 F.2d at 666-67. "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (citation and quotations omitted).

Courts examine the rule's purpose because "[i]f the document is couched ... in terms indicating that it will be regularly applied, a binding intent is strongly evidenced." *Id.* (citation and quotations omitted). Again, the key question is whether the challenged policy "leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case," or, instead, whether it "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria." *Shalala*, 56 F.3d at 596-97.

& n.4 (D.C. Cir. 1987), while others believe that this inquiry is subsumed within the binding/non-binding framework, *see McLouth Steel Prods. Corp.*, 838 F.2d at 1320 ("If a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations, in the sense those terms are used in *Community Nutrition*."). Because DAPA is a legislative rule under either formulation, Resp. Br. 61-62, the Court need not resolve this issue.

Courts also examine the policy's effect because it can reveal, as in other areas of the law, the agency's true intent. *See Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (D.C. Cir. 1972) ("[T]he label that the particular agency puts upon its given exercise of administrative power is not, for [these] purposes, conclusive; rather it is what the agency does in fact."). "If an agency acts as if a document issued at headquarters is controlling in the field," if it "treats the document in the same manner as it treats a legislative rule," or if it "bases enforcement actions on the policies or interpretations formulated in the document," then the statement "is for all practical purposes 'binding.'" *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *see also* Manning, *supra*, 918.

The United States offers two responses—neither of which is persuasive. First, the United States claims "it is irrelevant whether a statement of policy regarding the exercise of enforcement discretion also allows rank-and-file agents to be more aggressive in enforcement for case-specific reasons" because "[a] blanket policy is still a 'policy.'" Pet. Br. 69 (citing Black's Law Dictionary 1345 (10th ed. 2014)). But that argument is facially circular. Of course DAPA is a "policy." But the APA's notice-and-comment requirement covers policies no less than other forms of agency action. The issue is whether DAPA is "designed to implement, interpret, or prescribe law or policy," 15 U.S.C. § 551(4), or is "a general statement of policy," *id.* § 553(b)(3)(A). And, as explained, that turns on whether the policy does or does not bind the agency. Whether DAPA binds "rank-and-file agents" obviously bears heavily on that inquiry. The United States thus is quite correct that a blanket policy is still a policy. It is just

that DAPA's "blanket" nature makes this policy subject to notice-and-comment rulemaking.

Second, the United States claims that focusing on whether DAPA is binding "create[s] horrible incentives" by "prohibiting senior officials from announcing policies that bind rank-and-file agents, without first following notice-and-comment procedures." Pet. Br. 71. But the United States ignores that Section 553's exemption for "rule[s] of agency organization, procedure and practice," 5 U.S.C. § 553(b)(3)(A), accommodates this concern. It does so for the reason the United States identifies. If the policy is truly about internal operations, agencies should "retain latitude in organizing their internal operations." *Mendoza*, 754 F.3d at 1023.

But to fall within this category, the policy must impose only "derivative," "incidental," or "mechanical" burdens upon regulated individuals. *See Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984). If it "encodes a substantive value judgment[,] puts a stamp of approval or disapproval on a given type of behavior," *Am. Hosp.*, 834 F.2d at 1047, or "change[s] the substantive standards by which the [agency] evaluates" applications, *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994), it will be considered a legislative rule. It seems clear, then, why the United States does not rely on this exception. But the fact that DAPA cannot meet this test, *see infra* at 24-27, does not entitle the United States to expand a different exception in order to solve DHS's notice-and-comment problem.

C. DAPA Is Not A "General Statement Of Policy."

Under the proper test, there is no question that DAPA is a legislative rule for which notice and comment was required. To begin, DAPA's purpose is to formulate a "statutory scheme [so] that upon application one need only determine whether a given case is within the rule's criteria." *Shalala*, 56 F.3d at 596-97. As the district court found, DAPA's "'guidelines' are in fact requirements to be accepted under these programs." Pet. App. 383a. "[I]t is clear from the record that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein." Pet. App. 386a.

At a bare minimum, DAPA "severely restricts" any discretion agency officials possess. Pet. App. 386a. No more is required to uphold the judgment below. *See, e.g.*, *USTA*, 38 F.3d at 1234 ("It is rather hard to imagine an agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion."); *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (holding that "the rules which define parole selection criteria, new and old, are substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad power").

DAPA's binding effect is also apparent given the way in which DHS implemented DACA—a predecessor and related immigration policy. Resp. Br. 63-65. DAPA's "plain language" indicates "that DACA and DAPA would be applied similarly." Pet. App. 61a n.139. Secretary Johnson "direct[ed] USCIS to establish a process, *similar*

to DACA." Pet. App. 416a (emphasis added). DACA and DAPA also use similar legislative criteria. It therefore was entirely appropriate for the district court to examine how DHS had implemented DACA to predict (at the preliminary-injunction stage) how DHS likely would implement DAPA. *See, e.g., Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 827 n.5 (9th Cir. 2013) ("We reiterate that we consider only the limited record before us and only as a predictive matter at the preliminary injunction stage. Nothing in our opinion should be read as foreclosing the parties from introducing additional evidence as this case proceeds.").

The district court found that DACA had been applied mechanically. Pet. App. 56a n.130. Specifically, the district court found few denials (about five percent of 723,000 applications). Pet. App. 136a & n.44. Of those, the United States could not identify *any* discretionary denials. Pet. App. 56a-57a & n.130. Even if a few had occurred (despite all evidence to the contrary), moreover, that still would not show that DAPA was a general statement of policy. *See, e.g., Gen. Elec. Co*, 290 F.3d at 382; Resp. Br. 63.

The United States nevertheless claims that DAPA is not "binding" because DHS "remains free to modify or revoke the [policy] in [its] discretion." Pet. Br. 67. But, for understandable reasons, an agency's pronouncement that "it does not consider itself ... bound by [a rule] is obviously of little weight." *McLouth Steel Prods. Corp*, 838 F.2d at 1320. The policy's "substance and effect will determine whether a rule is a 'general statement of policy.'" *Guardian Federal Sav. & Loan Ass'n*, 589 F.2d at 666-67.

For similar reasons, the United States cannot rely on boilerplate language that DAPA implements "new policies," "confers no substantive right," and is "an exercise of prosecutorial discretion." Pet. App. 412a, 419a. The district court rightly rejected such disclaimers as "disingenuous" and "contrary to the substance of DAPA." Pet. App. 382a; *see, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013) (rejecting an agency's "pro forma reference to ... discretion" as "Orwellian newspeak").

That the United States claims that DHS remains free to "deny deferred action as to any individual under this policy, other policies, or under no policy at all, in [its] discretion," Pet. Br. 67, is just further evidence of regulatory gamesmanship. DAPA's stated purpose was to "encourage [unauthorized aliens] to come out of the shadows, submit to background checks, pay fees, apply for work authorization ... and be counted." Pet. App. 415a. An unauthorized alien, who meets DAPA's criteria and accepts this invitation "to come out of the shadows," would be justifiably outraged to learn that he was, in fact, being deported because DHS "remains free ... to pursue removal, in [its] discretion." Pet. Br. 67. These are precisely the type of "ad hoc determinations" that notice-and-comment rulemaking avoids. *Morton v. Ruiz*, 415 U.S. 199 (1974).

In the end, this case is no different from *Morton v. Ruiz*. Resp. Br. 67. There, the Bureau of Indian Affairs created "classifications and eligibility requirements" for Indian welfare assistance through a policy manual that did not receive notice and comment. The Court rejected this attempt to circumvent the APA. An agency's power

"to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law." *Morton*, 415 U.S. at 232 (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)). The BIA "presented no reason why the requirements of the [APA] could not or should not have been met." *Id.* at 236. BIA's "conscious choice" not "to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, render[ed] it ineffective." *Id.* at 236.

So too here. DAPA represents a massive change in immigration policy. This is *exactly* the type of significant change for which notice-and-comment rulemaking was intended. *See id.*; *see also Hoctor*, 82 F.3d at 171 ("The greater the public interest in a rule the greater reason to allow the public to participate in its formation."). Even supporters of such immigration policies, and the need for them to be solved administratively, recognize the need for public input on this subject. *See, e.g.*, Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 Duke L.J. 1787, 1794 (2010) (acknowledging that "even if effective policymaking requires some insulation from political pressures, the regime ultimately must respond to public views concerning acceptable levels of immigration, for reasons of democratic legitimacy in and of itself, as well as to nurture public confidence in government and acceptance of immigration over time"). Yet DHS offered the public and those affected by DAPA (including States such as Texas) *no* opportunity to comment before it was implemented.

III. This Administration Has Habitually Ignored The Notice-And-Comment Requirement Of The APA.

The United States gives short shrift to the notice-and-comment issue, focusing far more attention on other matters. That may be because, for the reasons set forth above, the United States is having trouble mounting a defense on this score. It may, though, be attributable to an assumption that DAPA is too prominent a program to be enjoined because of a procedural violation. If that is the case, the need for the Court's intervention is all the more urgent. Agencies must be disabused of any notion that the APA's procedural requirements are ministerial. An agency's failure to put a proposed rule out for notice and comment is no trivial violation. As explained above, "advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era." *Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 471 (D.C. Cir. 1980) (Bazelon, J., concurring).

Unfortunately, faithful compliance with the APA's notice-and-comment requirement is a recurring problem for this Administration. Time and again, since 2008, the Administration has come up with creative justifications for why notice and comment was not required. The problem is not limited to one official, one agency, or one issue; it is systematic throughout the Executive Branch. Examples are myriad:

The Transportation Security Administration, in 2010, began using advanced imaging technology ("AIT") to screen airline passengers at airports. AIT produced an image of an unclothed person and enabled the operator

to detect a nonmetallic object. Agreeing with the privacy-rights plaintiffs, the district court concluded that the agency "had advanced no justification for having failed to conduct a notice-and-comment rulemaking." *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011). As the court explained, "the changes substantively affect the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking. Indeed, few if any regulatory procedures impose directly and significantly upon so many members of the public. Not surprisingly, therefore, much public concern and media coverage have been focused upon issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments had the TSA seen fit to solicit comments upon a proposal to use AIT for primary screening." *Id.* at 319. The rule was vacated.

In 2012, the Department of Transportation issued a memorandum announcing that it would not apply the "Buy America" policy (a statutory requirement that steel or iron used in federally-funded highways be sourced from within the United States) to two specific categories of steel and iron products. Unions and other associations sued, arguing that the memorandum was a legislative rule. The district court agreed. The court noted that its decision "should not be construed as a criticism of the substance of the [memorandum] in adopting it. Indeed, [it] seems quite sensible. But even when an agency adopts a sensible rule it must follow proper procedures. Defendants failed to do so here." *United Steel v. Federal Highway Administration*, 2015 WL 9412105, at *15 (D.D.C. 2015). The rule was vacated.

In 2012, the Environmental Protection Agency promulgated an interim rule to permit manufacturers of heavy-duty diesel engines to pay certain penalties in exchange for the ability to sell noncompliant engines. Manufacturers of compliant heavy-duty diesel engines challenged the rule on notice-and-comment grounds. The D.C. Circuit agreed. In so ruling, the court "strongly reject[ed] EPA's claim that the challenged errors [were] harmless simply because of the pendency of a properly-noticed final rule. Were that true, agencies would have no use for the APA when promulgating any interim rules. So long as the agency eventually opened a final rule for comment every error in every interim rule—no matter how egregious—could be excused as harmless error." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012). The rule was vacated.

The Department of Labor, in 2011, issued two "Training and Employment Guidance Letters" setting the wages and working conditions that employers had to offer American animal herders before hiring foreign herders. These DOL letters were issued without notice and comment. American workers sued, "paint[ing] a portrait of agency capture" and arguing that the agency had failed to give "herders or their representatives an opportunity to be heard." *Mendoza*, 754 F.3d at 1007. The D.C. Circuit agreed, vacating the letters because they were "legislative rules [that] effect[ed] a substantive change in existing law or policy and effectively amend[ed] a prior legislative rule." *Id.* at 1024.

In 2013, the Federal Communications Commission issued, without notice and comment, reimbursement rules for telecommunications relay services. A provider

of such services challenged the rules, arguing that the FCC lacked "good cause" to bypass notice and comment. The D.C. Circuit again agreed, holding that the agency's assertion of an impending "fiscal calamity" as the basis for bypassing the APA's notice-and-comment command was an "unsupported assertion" that "[l]ack[ed] record support." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014). Those rules were vacated too.

The list goes on and on. *See, e.g.*, *City of Idaho Falls, Idaho v. Fed. Energy Reg. Comm'n*, 629 F.3d 222 (D.C. Cir. 2011); *FBME Bank Ltd. v. Lew*, --- F. Supp. 3d ---, No. 15-01270, 2015 WL 5081209 (D.D.C. 2015); *Mid Continent Nail Corp. v. United States*, 999 F. Supp. 2d 1307 (Ct. Int'l Trade 2014); *see also The Fourth Branch & Underground Regulations*, NFIB Small Business Legal Center 9-34 (Sept. 2015), http://goo.gl/t2iIo7 (identifying numerous "underground regulations" that were "adopted under the radar, without going through a notice-and-comment process, and impose substantive burdens on the regulated community"). Almost all of these cases are the same: the Administration claims a critical rule is needed—whether in transportation, the environment, communications, or elsewhere—and, as a result, notice-and-comment requirements must yield to an important policy initiative.

Nowhere has the Administration's allergy to notice and comment been more prevalent than in its implementation of the Affordable Care Act. "One of the hallmarks of Obamacare has been the sudden, ad hoc modifications of the law, outside the notice and comment process, through a series of executive memorandum, blog posts, and even ... FAQs." Josh Blackman, *Regulation by Blog Post: DDC Enjoins HHS From Implementing*

Website FAQ, http://goo.gl/t9KtNn; *see also* Zachary S. Price, *Enforcement Discretion & Executive Duty*, 67 Vand. L. Rev. 671, 749-54 (2014) (documenting the Administration's non-enforcement of key provisions of the Affordable Care Act). This "regulation by blog post," has allowed the Administration to engage in "ad-hoc lawmaking that affects millions of people and billions of dollars." Blackman, *supra*. Not surprisingly, without the benefit of public participation, "the government has been spending too much money, bestowing unappropriated benefits, and waiving mandates." *Id.*

* * *

"[T]he role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and complex." *Fox Television Stations*, 556 U.S. at 536 (Kennedy, J. concurring in part and concurring in the judgment). Agencies should heed this legitimate concern and conduct their business in a way that maximizes public participation. But that has not been the Administration's response. Far too often, it has viewed administrative procedural requirements merely as obstacles to be circumvented instead of as essential to vindicating the democratic principles of fair warning and the right to be heard. That is disappointing. Notice-and-comment rulemaking under Section 553 is a cornerstone of the APA. It must be enforced.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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